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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN: 3245-AG37

Small Business Size Standards: Construction

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The United States Small Business Administration (SBA) is increasing two small business size standards in North American Industry Classification System (NAICS) Sector 23, Construction, and retaining the current standards for the 30 remaining industries in that Sector. Specifically, SBA is increasing the size standards for NAICS 237210, Land Subdivision, from \$7 million in average annual receipts to \$25.5 million, and for Dredging and Surface Cleanup Activities, a sub-industry category (or an “exception”) under NAICS 237990, Other Heavy and Civil Engineering Construction, from \$20 million to \$25.5 million. As part of its ongoing comprehensive size standards review, SBA evaluated all size standards in NAICS Sector 23 to determine whether they should be retained or revised.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

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SUPPLEMENTARY INFORMATION:

To determine eligibility for Federal small business assistance programs, SBA establishes small business size definitions (referred to as size standards) for private sector industries in the United States. The SBA's existing size standards use two primary measures of business size, average annual receipts and number of employees. Financial assets, electric output and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC), 7(a), and Certified Development Company (CDC or 504) Loan Programs determine small business eligibility using either the industry based size standards or alternative net worth and net income size based standards. At the start of the current comprehensive review of size standards, there were 41 different size standards levels, covering 1,141 NAICS industries and 18 sub-industry activities. Of these, 31 were based on average annual receipts, seven based on number of employees, and three based on other measures. Presently, there are a total of 1,047 size standards, 533 of which are based on average annual receipts, 499 on number of employees, 10 on megawatt hours, and five on average assets.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy, and in particular, that they do not reflect changes in the Federal contracting marketplace and industry structure. The last comprehensive review of size standards was during the late 1970s and early 1980s. Since then, most reviews of size standards were limited to a few specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the Federal Register on July 18, 2008 (73 FR 41237).

SBA recognizes that changes in industry structure and the Federal marketplace since the last overall review have rendered existing size standards for some industries no longer supportable by current data. Accordingly, in 2007, SBA began a comprehensive review of its size standards to determine whether existing size standards have supportable bases relative to the current data, and to revise them, where necessary.

In addition, on September 27, 2010, the President of the United States signed the Small Business Jobs Act of 2010 (Jobs Act). The Jobs Act directs SBA to conduct a detailed review of all size standards and to make appropriate adjustments to reflect market conditions. Specifically, the Jobs Act requires SBA to conduct a detailed review of at least one-third of all size standards during every 18-month period from the date of its enactment and review of all size standards not less frequently than once every 5 years thereafter. Reviewing existing small business size standards and making appropriate adjustments based on current data are also consistent with Executive Order 13563, “Improving Regulation and Regulatory Review.”

SBA has chosen not to review all size standards at one time. Rather, it is reviewing groups of related industries on a Sector by Sector basis.

As part of SBA’s comprehensive review of size standards, grouped by NAICS Sector, the Agency reviewed all size standards in NAICS Sector 23, Construction, to determine whether the existing size standards should be retained or revised. After its review, SBA published in the July 18, 2012 issue of the Federal Register (77 FR 42197) a proposed rule to increase two standards in NAICS Sector 23. SBA proposed to increase the size standards for Land Subdivision (NAICS 237210) from \$7 million to \$25.5 million and for Dredging and Surface Cleanup Activities, an “exception” under

Other Heavy and Civil Engineering Construction (NAICS 238910) from \$20 million to \$30 million.

SBA recently developed a “Size Standards Methodology” for developing, reviewing, and modifying size standards, when necessary. SBA published the document on its website at [www.sba.gov/size](http://www.sba.gov/size) for public review and comments, and included it as a supporting document in the electronic docket of the proposed rule at [www.regulations.gov](http://www.regulations.gov).

In evaluating an industry’s size standard, SBA examines its characteristics (such as average firm size, startup costs, industry competition and distribution of firms by size) and the small business level and share of Federal contract dollars in that industry. SBA also examines the potential impact a size standard revision might have on its financial assistance programs, and whether a business concern under a revised size standard would be dominant in its industry. SBA analyzed the characteristics of each industry in NAICS Sector 23, mostly using a special tabulation obtained from the U.S. Bureau of the Census from its 2007 Economic Census (the latest available). SBA also evaluated the small business level and share of Federal contracts in each of those industries using the data from the Federal Procurement Data System – Next Generation (FPDS-NG) for fiscal years 2008-2010. To evaluate the impact of changes to size standards on its loan programs, SBA analyzed internal data on its guaranteed loan programs for fiscal years 2008-2010.

SBA’s “Size Standards Methodology” provides a detailed description of its analyses of various industry and program factors and data sources, and how the Agency uses the results to establish and revise size standards. In the proposed rule itself, SBA

detailed how it applied its “Size Standards Methodology” to review and modify where necessary, the existing size standards for industries in NAICS Sector 23. SBA sought comments from the public on a number of issues about its “Size Standards Methodology,” such as whether there are alternative methodologies that SBA should consider; whether there are alternative or additional factors or data sources that SBA should evaluate; whether SBA’s approach to establishing small business size standards makes sense in the current economic environment; whether SBA’s application of anchor size standards is appropriate in the current economy; whether there are gaps in SBA’s methodology because of the lack of comprehensive data; and whether there are other facts or issues that SBA should consider.

SBA sought comments on its proposal to increase the two size standards in NAICS Sector 23: Land Subdivision (NAICS 237210), from \$7 million to \$25.5 million, and Dredging and Surface Cleanup Activities, an “exception” under Other Heavy and Civil Engineering Construction (NAICS 238910), from \$20 million to \$30 million. Specifically, SBA requested comments on whether the size standards should be increased as proposed and whether the proposed revisions are appropriate. SBA also invited comments on whether its proposed eight fixed size standard levels are appropriate and whether it should adopt common size standards for several Industry Groups in NAICS Sector 23. Although SBA proposed to increase only two size standards, the public was welcome to comment on any other size standards in NAICS Sector 23 that the Agency proposed to retain.

The SBA’s analyses supported lowering existing size standards for a number of industries in NAICS Sector 23. However, as SBA pointed out in the proposed rule,

lowering size standards would reduce the number of firms eligible to participate in Federal small business assistance programs and be counter to what the Federal government and SBA are doing to help small businesses. Therefore, SBA proposed to retain the current size standards for those industries and requested comments on whether the Agency should lower size standards for which its analyses might support lowering them.

#### Summary of Comments

There were 25 unique commenters to the proposed rule, including four construction companies, two construction industries associations, 16 dredging companies, one dredging consulting company, one academic, and one telecommunications company. The comments are available at [www.regulations.gov](http://www.regulations.gov) (RIN 3245-AG28) and are summarized below.

#### Comments on proposed changes to construction size standards

A construction company commented that increasing size standards helps 8(a) and Women Owned Small Businesses keep their contracts. However, at the same time, the commenter stated, increasing size standards takes away the ability for new start-up firms to get any traction and reducing size standards across the board “is the key to success for small business.” The commenter contended that SBA’s proposal is “an attempt to limit the ability of the U.S. Department of Veteran Affairs’ SDVOSB program which is competing for contracts against the 8(a) firms.”

Another construction company similarly opposed any increase in size standards, stating that there are too many types of small businesses competing for government construction dollars.

SBA proposed to increase only two of the 32 size standards in NAICS Sector 23, namely Land Subdivision (NAICS 237210), and Dredging and Surface Cleanup Activities, an exception under Other Heavy and Civil Engineering Construction (NAICS 238910) and retain the current size standards for the 30 remaining industries in that Sector. Furthermore, SBA's size standards apply equally to all programs for which a business must qualify as a small business concern. The Federal government has a number of business development programs, and qualifying as small for one is the same as qualifying for the others, because SBA has established only set of size standards for all Federal procurement programs. SBA's proposed increases to size standards, as stated above, would not have affected the two commenters above, as they did not refer to size standards for a specific industries and therefore, SBA acknowledges their comments as supportive of retaining the current size standards for most industries that the Agency proposed.

Another commenter expressed concern about the size of construction contracts set aside for small businesses under the current \$33.5 million size standard. According to the commenter, many companies that are over the current size standards cannot qualify to bid on larger contracts. The commenter further stated that contracts over \$10 million should not be set aside for small businesses. There would remain, it seems, contracts for which businesses over the \$33.5 million size standard could bid without competition from larger businesses.

SBA establishes small business size standards to determine eligibility for small business set aside contracts, but it does not determine the size of contracts that Federal agencies set aside for small businesses. SBA takes into consideration the size of

contracts in establishing small business size standards by analyzing the data from FPDS-NG.

Another commenter that supported SBA's proposed increases suggested that SBA establish a \$30 million size standard for government projects involving three or more specialty trade services.

SBA has a common \$14 million size standard for contracts involving three or more specialty trades industries. Specifically, Footnote 13 to SBA's table of size standards states the following: "NAICS code 238990 – Building and Property Specialty Trade Services: If a procurement requires the use of multiple specialty trade contractors (i.e., plumbing, painting, plastering, carpentry, etc.), and no specialty trade accounts for 50% or more of the value of the procurement, all such specialty trade contractors activities are considered a single activity and classified as Building and Property Specialty Trade Services." However, as stated in Footnote 12(b), if the contracts involve three or more activities in the areas of services or specialty trades trade industries, with no single industry accounting for more than 50 percent of the total values of procurement, firms may qualify under the \$35.5 million size standard NAICS 561210, Facilities Support Services. SBA is concerned that establishing a higher size standard for a group of industries than for each industry in the group, as the commenter suggested, may encourage agencies to bundle contracts to include services from multiple industries and use the higher size standard. This may adversely affect the ability of small businesses that specialize on a specific specialty trade service to compete for Federal opportunities.

A national association expressed its concern for a lack of construction contracts awarded to women owned small businesses. The association argued that small business



size standards for construction industries should be based on number of full time equivalent (FTE) employees, rather than on average annual receipts. The association claimed that because size standards are based on receipts rather than number of employees, businesses in the construction industries are being held back. The association contended that a construction company's receipts are a "misleading indicator" for its size from one year to the next due to "doubling and tripling in recent years" of material costs. In addition, the association stated that a company's gross receipts are inflated relative to the size standard because of subcontracting and material costs that could account for as much as 85 percent of work being performed.

A local chapter of the same association supported and expanded on the above view. It stated that costs vary across the country, being higher in urban areas than in rural areas, resulting in considerably larger construction companies in urban areas than in rural areas. The association added that it is more difficult for small urban contractors to compete with larger ones and cited certain trades that have considerably higher start-up capital and labor costs as well. The commenter recommended 75 FTE employees for Specialty Trades Industries and 150 FTE employees for General Construction. The association went on to state that "if SBA opts to continue with the receipts based size standard for the construction industry, [commenter] would recommend that these specialty trades be grouped and placed in the higher \$25 million size standard level."

SBA disagrees that receipts based standards do not properly reflect the size of companies in the construction industry. Receipts, representative of the value of a company's entire portfolio of completed work in a given period of time, is a better measure of the size of a construction company to determine its eligibility for Federal

contracts set aside for small businesses than the number of employees. Annual receipts measure the total work that a company has completed for which it was responsible.

Under SBA's prime contractor performance requirements (see 13 CFR § 125.6, limitations on subcontracting), a general construction company need to perform as little as 15 percent of value of work with its own resources, and a specialty trade contractor can perform as little as 25 percent of work with its own resources. SBA is concerned that employee based size standards for construction industries could encourage a construction company near the size standard to subcontract more work to others to bypass the limitations on subcontracting and remain technically a small business. Regardless of the amount a company subcontracts, it is part of its annual revenue, because the company is responsible for the entire project. In other words, under a receipts based size standard, the company is not allowed to deduct subcontracting costs from the average annual receipts calculation. Under the employee based size standard, companies would not count their subcontractors' employees to calculate their total number of employees. A company that subcontracts a great deal can have a considerably fewer employees than one that performs more of its work in-house.

Furthermore, in 2004, SBA proposed to replace annual receipts with number of employees as the basis for size standards for most industries, including construction (see 69 FR 11129, dated March 19, 2004). Commenters in the construction industry generally opposed SBA's proposal for a number of reasons, such as those SBA provides above. In addition, because employee based size standards represent the average number of employees per pay period for the firm's immediately preceding 12 calendar months, businesses would have to recalculate their size on a monthly basis. Receipts, on the other

hand, are calculated over last three fiscal years. This allows for changes in the construction industry as well as fluctuations in sales due to economic conditions.

Employment data by industry from Economic Census and County Business Patterns and Federal statistical agencies (such as Bureau of Economic Analysis and Labor Statistics) that SBA uses in its size standards analysis are based on total head counts of part-time, temporary and full-time employees, not based on FTEs. In other words, part-time employees are counted the same as full-time employees. In addition, using FTEs as a basis of size measure may increase reporting and record keeping requirements for small businesses to qualify for Federal programs.

Thus, SBA is, for all these reasons above, retaining annual receipts as the measure of small business size standards for all industries in NAICS Sector 23, Construction.

#### Comments on proposed change to size standard for dredging

SBA received a total of 17 comments on its proposal to increase the size standard for Dredging and Surface Cleanup Activities from \$20 million in average annual receipts to \$30 million. Commenters included 16 dredging companies (10 small and 6 large businesses under the current size standard) and one small dredging consulting company. Ten commenters (53 percent) either supported the proposed increase to \$30 million or suggested smaller increases than the one proposed by SBA. Seven commenters (47 percent) either opposed the proposed increase, or suggested lowering it.

Of the ten companies that supported an increase in size standard for dredging, six were small businesses under the current size standard, and four were large businesses. Four of these ten commenters fully supported the proposed increase to \$30 million, five suggested smaller increases, and one suggested a larger increase but did not provide a

specific value. Of the five commenters suggesting smaller increases, one suggested increasing it to \$25.5 million, another, a large dredger, suggested increasing it by 10 percent, and three, one small and two large dredging companies, suggested that the increase should be in line with the rate of inflation. Most of these commenters cited increased cost of doing business, contract bundling, high capital and resource requirements, and ability to maintain small business status as the reasons for supporting the increase.

Of the seven commenters who opposed the SBA's proposal, five were small businesses under the current size standard and two were large businesses. Four of these commenters, one large and three small, opposed the proposed \$30 million in support of the current \$20 million, two commenters, one large and one small, proposed reducing it to \$10 million, and one commenter, small, also proposed lowering it but did not provide a specific value. Commenters opposing the SBA's proposal raised a number of issues as follows: current economic conditions do not justify a 50 percent increase; it would be inconsistent with the interests of small dredging companies; the dredging market contracted because of a lack of funding, with small dredging companies struggling to find work; larger small companies would dominate the small business market, making an already very competitive industry even more so and thus more difficult for small dredging contractors to survive; it would foster predatory pricing, and the data SBA used to develop its proposal do not reflect the current state of the dredging market. Most of these commenters felt that the proposed size standard under the current environment would only benefit larger small businesses in the \$20 million to \$30 million revenue range by reducing opportunities for small businesses below \$20 million.

Larger dredging contractors, generally opposed to the proposed increase, stated that this is the largest increase in the size standard for dredging contractors since 1984, when SBA first established it. They argued that the proposed \$30 million is not supported by marketplace or other available data. They reasoned that the higher standard would induce the U.S. Army Corps of Engineers (the Corps) to set aside a larger share of contracts for the newly eligible companies. This would reduce the unrestricted contracts available to large businesses that have invested heavily in equipment and resources to meet the Corps' program requirements. This in turn could result in higher costs to the government, lead to underuse of dredging equipment, and cause companies to contain their costs by laying off their employees.

Several commenters, especially those in favor of raising the dredging size standard, expressed concerns about the impact of increasing costs of fuel, labor and other costs in the dredging market and argued that an increase in the size standard is warranted. One commenter, a small dredging company, stated that costs of diesel fuel increased more than 30 percent over the last five years; labor costs increased by over 25 percent, and costs of insurance, health benefits and supplies increased by over 50 percent.

SBA's current review of the dredging size standard focuses on the analysis of industry structure and Federal market. Although this analysis may capture some of the inflationary factors the commenters identified above, inflation is not considered as a factor in this review. SBA will look at the impact of inflation on all monetary-based size standards, including that for dredging, and adjust them as necessary, in a separate rule in the near future.

Three commenters expressed concerns about the data SBA used to review the dredging industry size standard. One commenter argued that the data from the Central Contractor Registration (CCR) (now System for Award Management (SAM)) that SBA used in conjunction with dredging contracting data from the U.S. Army Corps of Engineers' Navigation Data Center (NDC) are incomplete and inaccurate. The commenter recommended using the data from the Dredging Contractors of America (DCA) annual contract summary reports prepared using the NDC data. The second commenter, contrary to the first one, strongly recommended using the NDC data to analyze the dredging industry. Finally, the third commenter expressed concerns that the NDC data do not include enough information about small businesses' contracts for dredging, but did not suggest any alternative data sources to look at. None of these commenters expressed concerns about the Federal contracts data on dredging from the FPDS-NG that SBA used to calculate industry and Federal contracting factors (see 77 FR 42197). Similarly, although both NDC data and DCA reports only contain information on revenues received from Federal contracts and no information on firms' total revenues, commenters suggested no alternative sources providing total revenues that SBA evaluates when reviewing a receipts based size standard.

In response to these comments, SBA evaluated the impact of data sources on industry and Federal contracting factors and the calculated size standard for dredging using the data from NDC for fiscal years 2011-2012, DCA's annual report for fiscal years 2010-2011, and FPDS-NG for fiscal years 2011-2012. SBA combined each of these data with the data from CCR/SAM to obtain total revenues of dredging firms participating in the Federal market, as described in the proposed rule. The results based on each of these

data sources were very similar, as expected, because the Federal Acquisition Regulation (FAR subpart 4.6) requires all Federal agencies, including U.S. Army Corps of Engineers, to enter information on all contract actions exceeding the micro-purchase threshold in FPDS-NG. Accordingly, information in the NDC database and hence in DCA's reports has to be fundamentally the same as that in FPDS-NG. Given the lack of a better source for total revenue data on dredging firms, SBA believes that information in CCR/SAM is accurate enough for evaluating the dredging size standard, because, to bid on Federal contracts, all businesses, including dredging firms, are required to provide accurate information on their business size when they register in CCR/SAM (FAR subpart 4.11).

Several commenters, mostly those opposing the SBA's proposal, expressed concerns about raising the size standard in view of the current state of the dredging industry and the impact the American Recovery and Reinvestment Act (ARRA) had on the Federal market for dredging. These commenters characterized dredging as a reduced market, principally because of a lack of funding, with ARRA phasing-out. They argued that, because ARRA caused a temporary surge in government spending during fiscal years 2009-2011 and now the ARRA funds are phasing-out, any analysis of the Federal market using the data for those years could be distorted. The commenters argued that increasing the size standards under the current conditions would have an adverse impact on the pool of funds available for both small and large dredging companies. They added that, with a higher size standard, small businesses, especially the truly small businesses, would face increased competition for set-aside contracts, and large businesses would face a reduction of funds available for the unrestricted market were they compete. Some

commenters added that increasing the size standard in this environment will benefit only larger small businesses.

In response to the above comments, SBA re-evaluated the dredging industry using the data on Federal contracts awarded to dredging companies from FPDS-NG for fiscal years 2005 to 2012 and total revenue information from CCR/SAM for fiscal year 2012. The analysis of FPDS-NG data showed that the ARRA resulted in a surge in Federal contract dollars awarded to dredging companies during fiscal years 2009-2011. The average annual dollars obligated for dredging was about \$775 million for fiscal years 2005-2008 and 2012, as compared to \$1.1 billion per year during fiscal years 2009-2011. In addition, the data showed that the average share of dollars awarded to small businesses decreased from 23.3 percent during 2007-2008 to 15 percent during 2009-2011. Data for fiscal year 2012 showed that the small businesses' share was recovering but was still below the level seen during 2007-2008. Based on these results, SBA agrees with the commenters that the ARRA impacted the dredging market during fiscal years 2009-2011. SBA also agrees that availability of funds is important to the dredging market, but it does not agree that the increased availability of funds alone would provide more opportunities to small businesses. As shown by the data above, although total dollars obligated to the dredging market substantially increased during fiscal years 2009-2011 following the ARRA, the average share of dollars awarded to small businesses actually decreased in that period.

In response to a claim from some commenters that an increase in size standard would only benefit currently large businesses that will become small under the proposed \$30 million size standard, SBA evaluated a distribution of dollars obligated by the



receipts size of the dredging companies receiving the Federal contracts using the data from FPDS-NG and CCR/SAM for fiscal year 2012. The results showed that more than 85 percent of the dredging companies that received the contracts were below the current \$20 million size standard, and they received about 22 percent of the total dollars awarded on new or modified dredging contracts. About 32 percent of the firms below the current size standard had average annual receipts between \$10 million and \$20 million, and they received 11.2 percent of dollars obligated for dredging projects. Moreover, the data showed that only 2 to 4 firms that are large under the current size standard would become small under the proposed \$30 million size standard, if adopted, and those firms accounted for only 2.4 percent of total dollars awarded to dredging projects in 2012. The data also showed that 21 small dredging companies received contracts under full and open competition in fiscal year 2012, suggesting that set-aside contracts are not the only opportunities for small businesses in the Federal dredging market. All these results suggest that an increase in size standard will not cause a significant adverse impact on small businesses below the current size standard. Rather a higher size standard will benefit a large number of businesses below the current size standard by providing them with more opportunity for growth while maintaining their small business status for a longer period.

In response to the comments on its proposal to increase the size standard for dredging from \$20 million to \$30 million, especially the comment that the data for fiscal years 2008-2010 used in developing the proposed size standard do not represent the current state of the Federal dredging market, SBA re-evaluated industry and federal contracting factors of the dredging industry using the data from FPDS-NG and

CCR/SAM in conjunction with the data from NDC for fiscal year 2012. The results of this analysis supported a lower increase of the dredging size standard to \$25.5 million, instead of \$30 million that SBA originally proposed based on the 2008-2010 data.

With only two firms above the current \$20 million size standard qualifying as small under \$25.5 million, SBA believes that this increase will not have an adverse impact on both small businesses below the current \$20 million size standard and large businesses above \$25.5 million. Instead, as pointed out above, a higher size standard will benefit a larger number of small businesses below the current size standard by providing them with more opportunity to grow while maintaining their small business status.

Thus, after the careful evaluation of all comments SBA received, re-evaluation of industry and Federal contracting factors for the dredging industry using the more recent data from various sources (such as NDC, DCA's annual reports, FPDS-NG, and CCR/SAM), SBA has decided to increase the size standard for the Dredging and Surface Cleanup Sub-Industry within NAICS Industry 237990 from the current \$20 million to \$25.5 million in average annual receipts. With this increase, only two firms that are large under the current \$20 million size standard will gain small business status and SBA believes that this will not have an adverse impact on small businesses below the current size standard.

#### Comments on footnote 2

In the July 18, 2012 proposed rule, SBA also sought comments on footnote 2 to SBA's table of size standards. Footnote 2 states that "[t]o be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern."

SBA received 16 comments on this issue, all of which supported retaining the footnote. Two commenters recommended raising the 40 percent requirement, one of which recommended increasing it to 50 percent and the other to 80 percent. Generally, commenters were concerned that the elimination of the 40 percent requirement could defeat the purpose of set-asides, by permitting small businesses to “front” for larger businesses by brokering set-aside contracts to them. Commenters saw no practical reasons to remove the requirement, and a number of commenters stated clearly that it has worked well for this industry in assuring that only small businesses benefit from set-aside projects. Therefore, SBA is retaining footnote 2 in its present form.

### Conclusion

Based on the evaluation of public comments it received on the proposed rule and reevaluation of ,industry and Federal contracting factors using the more recent data, SBA is increasing the size standards for NAICS 237210, Land Subdivision, from \$7 million in average annual receipts to \$25.5 million, as proposed, and for Dredging and Surface Cleanup Activities, a sub-industry category (or an “exception”) under NAICS 237990, Other Heavy and Civil Engineering Construction, from \$20 million to \$25.5 million. In the proposed rule, SBA had proposed to increase the dredging size standard to \$30 million. Those industries and their revised size standards are shown in Table 1, Summary of Size Standards Revisions, below.

Table 1  
Summary of Size Standards Revisions

NAICS codes	NAICS industry title	Current size standard (\$ million)	Proposed size standard (\$ million)	Adopted size standard (\$ million)
237210	Land Subdivision	\$7.0	\$25.5	\$25.5
237990, Except	Dredging and Surface Cleanup Activities <sup>2</sup>	\$20.0	\$30.0	\$25.5

For the reasons as stated above in this rule and in the proposed rule, SBA has decided to retain the current receipts based size standards for a number of industries in NAICS Sector 23 for which analytical results suggested lower size standards. Not lowering size standards in NAICS Sector 23 is consistent with SBA's recent final rules on NAICS Sector 44-45, Retail Trade (75 FR 61597 (October 6, 2010)), NAICS Sector 72, Accommodation and Food Services (75 FR 61604 (October 6, 2010)), NAICS Sector 81, Other Services (75 FR 61591 (October 6, 2010)), NAICS Sector 54, Professional, Scientific and Technical Services (77 FR 7490 (February 10, 2012)), NAICS Sector 48-49, Transportation and Warehousing (77 FR 10943 (February 24, 2012)), NAICS Sector 53, Real Estate and Rental and Leasing (77 FR 58747 (September 24, 2012)), NAICS Sector 61, Educational Services (77 FR 58739 (September 24, 2012)), NAICS Sector 62, Health Care and Social Assistance (77 FR 58755 (September 24, 2012)), NAICS Sector 51, Information (77 FR 72702 (December 6, 2012)), and NAICS Sector 56, Administrative and Support, Waste Management and Remediation Services (77 FR 72691 (December 6, 2012)); NAICS Sector 11, Agriculture, Forestry, Fishing and Hunting (78 FR 37398 (June 20, 2013)); NAICS Subsector 213, Support Activities for

Mining (78 FR 37404 (June 20, 2013)); NAICS Sector 52, Finance and Insurance and Sector 55, Management of Companies and Enterprises (78 FR 37409 (June 20, 2013)); and NAICS Sector 71, Arts, Entertainment and Recreation (78 FR 37417 (June 20, 2013)). In each of those final rules SBA adopted its proposal not to reduce small business size standards for the same reasons. SBA is also retaining the existing receipts based size standards for the industries for which the results supported them at their current levels.

Compliance with Executive Orders 12866, 13563, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C., Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)  
Executive Order 12866:

The Office of Management and Budget (OMB) has determined that this final rule is not a “significant regulatory action” for purposes of Executive Order 12866. To help explain the need of this rule and the rule’s potential benefits and costs, SBA is providing below a Cost Benefit Analysis. This is also not a “major” rule, under the Congressional Review Act, 5 U.S.C. 801, et. seq.

Cost Benefit Analysis:

1. Is there a need for the regulatory action?

SBA believes that the revised changes to small business size standards for one industry and one sub-industry in NAICS Sector 23, Construction, reflect changes in economic characteristics of small businesses in those industries and the Federal procurement market since the last size standards review. SBA’s mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To assist the intended beneficiaries of these

programs effectively, SBA establishes distinct definitions to determine which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegated to the SBA's Administrator the responsibility for establishing definitions for small business. The Act also requires that small business size definitions vary to reflect industry differences. The Jobs Act requires the Administrator to review at least one-third of all size standards within each 18-month period from the date of its enactment, and review all size standards at least every five years thereafter. The supplementary information section of the July 18, 2012 proposed rule and this rule explained the SBA's methodology for analyzing a size standard for a particular industry.

2. What are the potential benefits and costs of this regulatory action?

The most significant benefit to businesses obtaining small business status as a result of this rule is gaining eligibility for Federal small business assistance programs, including SBA's financial assistance programs, economic injury disaster loans, and Federal procurement opportunities intended for small businesses. Federal small business programs provide targeted opportunities for small businesses under SBA's various business development and contracting programs. These include the 8(a), small disadvantaged businesses (SDB), small businesses located in Historically Underutilized Business Zones (HUBZone), women owned small businesses (WOSB), and the service disabled veteran owned small business (SDVOSB) Programs. These programs help small businesses become more knowledgeable, stable, and competitive. Other Federal agencies also may use SBA's size standards for a variety of regulatory and program purposes. In the one industry and one sub-industry in NAICS Sector 23 for which SBA has decided to increase size standards, SBA estimates that about 480 additional firms (including two

dredging companies), not small under the current size standards, will gain small business status and become eligible for these programs. That number is 0.1 percent of the total number of total firms classified as small under the current size standards in all industries in NAICS Sector 23. SBA estimates that this will increase the small business share of total industry receipts in that Sector from 49.7 percent under the current size standards to 50 percent under the revised size standards.

The benefits of increasing size standards to a more appropriate level will accrue to three groups: (1) some businesses that are above the current size standards will gain small business status under the higher size standards, thereby enabling them to participate in Federal small business assistance programs; (2) growing small businesses that are close to exceeding the current size standards will be able to retain their small business status under the higher size standards, thereby enabling them to continue their participation in the programs; and (3) Federal agencies will have a larger pool of small businesses from which to draw for their small business procurement programs.

Based on the data for fiscal years 2008-2010, SBA estimates that additional firms gaining small business status in those industries under the revised size standards could potentially obtain Federal contracts totaling between \$5 million to \$10 million per year under the small business, 8(a), SDB, HUBZone, WOSB, and SDVOSB Programs and other unrestricted procurements. The added competition for many of these procurements may also result in lower prices to the Government for procurements reserved for small businesses, although SBA cannot quantify this benefit.

Under SBA's 7(a) and 504 Loan Programs, based on the 2008-2010 data, SBA estimates that approximately up to five additional loans totaling about \$0.5 million to

\$1.0 million in new Federal loan guarantees could be made to the newly defined small businesses under the revised size standards. Under the Jobs Act, SBA can now guarantee substantially larger loans than in the past. In addition, the Jobs Act established an alternative size standard for SBA's 7(a) and 504 Loan Programs for those applicants that do not meet the size standards for their industries. That is, under the Jobs Act, if a firm applies for a 7(a) or 504 loan but does not meet the size standard for its industry, it might still qualify if, including its affiliates, it has a tangible net worth that does not exceed \$15 million and also has average net income after Federal income taxes (excluding any carry-over losses) for its preceding two completed fiscal years that do not exceed \$5 million. Thus, SBA finds it difficult to quantify the actual impact of the revised size standards on its 7(a) and 504 Loan Programs.

Newly defined small businesses will also benefit from SBA's Economic Injury Disaster Loan Program. Since this program is contingent on the occurrence and severity of a disaster, SBA cannot make a meaningful estimate of this impact.

To the extent that all 480 newly defined additional small firms under the revised size standards could become active in Federal procurement programs, this may entail some additional administrative costs to the Federal Government associated with there being more bidders for Federal small business procurement opportunities. In addition, there will be more firms seeking SBA's financial assistance, more firms eligible for enrollment in the System of Award Management's (SAM) Dynamic Small Business Search database, and more firms seeking certification as 8(a) or HUBZone firms or those qualifying for small business, WOSB, SDVOSB, and SDB status. Among those newly defined small businesses in this group seeking SBA's assistance, there could be some



additional costs associated with compliance and verification of small business status and protests of small business status. SBA believes that these added administrative costs will be minimal because mechanisms are already in place to handle these requirements.

Additionally, the costs to the Federal Government may be higher on some Federal contracts under the higher revised size standards. With a greater number of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses rather than using full and open competition. The movement from unrestricted to set-aside contracting might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. In addition, higher costs may result when additional full and open contracts are awarded to HUBZone businesses because of a price evaluation preference. However, these additional costs associated with fewer bidders are expected be minor since, by law, procurements may be set aside for small businesses or reserved for the small business, 8(a), HUBZone, WOSB, or SDVOSB Programs only if awards are expected to be made at fair and reasonable prices.

The revised size standards may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of gains and losses among small and large businesses, it can identify several probable impacts. There may be a transfer of some Federal contracts from large businesses to small businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more Federal contracts for small businesses. In addition, some agencies may award more Federal contracts to HUBZone concerns instead of large businesses since HUBZone concerns may be eligible for price evaluation

adjustments when they compete on full and open bidding opportunities. Similarly, currently defined small businesses may obtain fewer Federal contracts due to the increased competition from more businesses defined as small under the revised size standards. This transfer may be offset by more Federal procurements set aside for all small businesses. The number of newly defined and expanding small businesses that are willing and able to sell to the Federal Government will limit the potential transfer of contracts away from large and small businesses under the existing size standards. The SBA cannot estimate with precision the potential distributional impacts of these transfers.

The revisions to the existing size standards for one industry and one sub-industry in NAICS Sector 23, Construction, are consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

#### Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action including possible distributional impacts that relate to Executive Order 13563 are included above in the Cost Benefit Analysis.

In an effort to engage interested parties in this regulatory action, SBA presented its methodology (discussed under Supplementary Information in the proposed rule and this final rule) to various industry associations and trade groups. SBA also met with

various industry groups to obtain their feedback on its methodology and other size standards issues. In addition, SBA also presented its size standards methodology to businesses in 13 cities in the U.S. and sought their input as part of the Jobs Act tours. The presentations also included information on the latest status of the comprehensive size standards review and how interested parties can provide SBA with input and feedback on the size standards review. Moreover, SBA presented the same information to Department of Defense (DoD) contracting personnel at their annual training session. It included updates on what size standards rules SBA was currently reviewing and plans to review in the future. This is important because DoD contracting provides the greatest opportunities for and awards to small businesses.

Additionally, SBA sent letters to the Directors of the Offices of Small and Disadvantaged Business Utilization (OSDBU) at several Federal agencies with considerable procurement responsibilities requesting their feedback on how the agencies use SBA's size standards and whether current standards meet their programmatic needs (both procurement and non-procurement). SBA gave appropriate consideration to all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies in preparing the proposed rule for Sector 23.

Furthermore, when SBA issued the proposed rule, it provided notice of its publication directly to individuals and companies that had in recent years exhibited an interest by letter, email, or phone, in size standards for NAICS Sector 23 so they could comment.

The review of size standards in NAICS Sector 23, Construction, is consistent with Section 6 of Executive Order 13563, calling for retrospective analyses of existing rules. The last overall review of size standards occurred during the late 1970s and early 1980s. Since then, except for periodic adjustments for monetary based size standards, most reviews of size standards were limited to a few specific industries in response to requests from the public and Federal agencies. SBA recognizes that changes in industry structure and the Federal marketplace over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, in 2007, SBA began a comprehensive review of all size standards to ensure that existing size standards have supportable bases and to revise them, when necessary. In addition, the Jobs Act directs SBA to conduct a detailed review of all size standards and to make appropriate adjustments to reflect market conditions. Specifically, the Jobs Act requires SBA to conduct a detailed review of at least one-third of all size standards during every 18 month period from the date of its enactment and do a complete review of all size standards not less frequently than once every 5 years thereafter.

#### Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

#### Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this final rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities

among the various levels of government. Therefore, SBA has determined that this final rule has no Federalism implications warranting preparation of a Federalism assessment.

#### Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this final rule would not impose any new reporting or record keeping requirements.

#### Final Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule may have a significant impact on a substantial number of small entities in NAICS Sector 23, Construction. As described above, this rule may affect small entities seeking Federal contracts, SBA's 7(a) and 504 Guaranteed Loans, SBA's Economic Injury Disaster Loans, and various small business benefits under other Federal programs.

Immediately below, SBA sets forth a final regulatory flexibility analysis of this final rule addressing the following questions: (1) What are the need for and objective of the rule? (2) What are SBA's description and estimate of the number of small entities to which the rule will apply? (3) What are the projected reporting, record keeping, and other compliance requirements of the rule? (4) What are the relevant Federal rules which may duplicate, overlap or conflict with the rule? and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

(1) What are the need for and objective of the rule?

Most of SBA's size standards for the Construction industries had not been reviewed since the 1980s. Technological changes, productivity growth, international

competition, mergers and acquisitions and updated industry definitions may have changed the structure of many industries in that Sector. Such changes can be sufficient to support revisions to size standards for some industries. Based on the analysis of the latest industry and program data available, SBA believes that the revised standards in this rule more appropriately reflect the size of businesses in those industries that need Federal assistance. Additionally, the Jobs Act requires SBA to review all size standards and make appropriate adjustments to reflect current data and market conditions.

(2) What are SBA's description and estimate of the number of small entities to which the rule will apply?

SBA estimates that approximately 480 additional firms will become small because of increases in size standards in one industry and one sub-industry in NAICS Sector 23. That represents 0.1 percent of total firms that are small under the current size standards in all industries in NAICS Sector 23. This will result in an increase in the small business share of total industry receipts in that Sector from about 49.7 percent under the current size standards to nearly 50 percent under the revised size standards. SBA does not anticipate a significant competitive impact on smaller businesses under the revised size standards. The revised size standards will enable more small businesses to retain their small business status for a longer period. Under current size standards, many small businesses may have lost their eligibility or found it difficult to compete with companies that are significantly larger than they are and this final rule attempts to correct that impact. SBA believes these changes will have a positive impact for existing small businesses and for those that have either exceeded or are about to exceed current size standards.

(3) What are the projected reporting, record keeping, and other compliance requirements of the rule?

Revising size standards does not impose any additional reporting or record keeping requirements on small entities. However, qualifying for Federal procurement and a number of other Federal programs requires that entities register in the System of Award Management (SAM) (formerly, the Central Contractor Registration) database and certify at least annually that they are small in the Representations and Certifications section of SAM. Therefore, businesses opting to participate in those programs must comply with the SAM requirements. There are no costs associated with SAM registration and certification. Revising size standards alters the access to SBA's and other Federal programs that are designed to assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

(4) What are the relevant Federal rules which may duplicate, overlap, or conflict with the rule?

Under § 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute to do otherwise. In 1995, SBA published in the Federal Register a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988 (November 24, 1995)). SBA is not aware of any Federal rule that would duplicate or conflict with establishing or revising size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to establish different size standards if they believe that SBA's size standards are not

appropriate for their programs, with the approval of SBA's Administrator (see 13 CFR § 121.903). The Regulatory Flexibility Act authorizes an agency to establish an alternative small business definition after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3)).

(5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs. Other than varying size standards by industry and changing the size measures, no practical alternative exists to the existing system of numerical size standards.

#### List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs – business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For reasons set forth in the preamble, SBA amends 13 CFR part 121 as follows:

#### PART 121 – SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for Part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. In § 121.201, in the table, “Small Business Size Standards by NAICS Industry,” revise the entry for “237210” and subentry “Except” under entry “237990” to read as follows:



§ 121.201. What size standards has SBA identified by North American Industry

Classification System codes?

\* \* \* \* \*

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS Codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
* * * * *			
237210	Land Subdivision	\$25.5	
* * * * *			
237990	* * *		
Except,	Dredging and Surface Cleanup Activities <sup>2</sup>	\$25.5	
* * * * *			

Footnotes

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2. NAICS code 237990 – Dredging: To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.

\* \* \* \* \*

Dated: August 12, 2013.

Karen G. Mills,  
Administrator.

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